No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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June 7, 1984

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QUESTIONS PRESENTED

1. Whether, in an antitrust conspiracy case based upon "parallel" acts and other circumstantial evidence, summary judgment for the defendants may be reversed when the District Court has found that all of the evidence is entirely consistent with the independent economic self-interest of each defendant, and the Court of Appeals has neither rejected that finding nor even considered whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action?

2. Whether a court of the United States may: (i) disregard the duly issued statement of a friendly foreign government attesting that certain export controls observed by its nationals were compelled by that government; (ii) permit a trier of fact to adjudicate the veracity of such an official government statement; or (iii) hold such government-mandated conduct to constitute or be a "feature" of a conspiracy in violation of the antitrust laws of the United States?

3. Whether a district court is powerless to exclude proffered expert testimony that it finds to be based upon false or unsupported factual assumptions, once it is found that the data upon which the expert's testimony is based are "of the type" upon which other experts in the field reasonably rely?

PARTIES TO THE PROCEEDING

Petitioners are Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., Matsushita Electronics Corporation, Toshiba Corporation, Toshiba America, Inc., Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, Hitachi Sales Corporation of America, Mitsubishi Electric Corporation, Mitsubishi Electric Sales America, Inc., Mitsubishi Corporation, Mitsubishi International Corporation, Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., Sanyo Manufacturing Corporation, Sharp Corporation, and Sharp Electronics Corporation.[1]

Respondents are Zenith Radio Corporation and National Union Electric Corporation.[2]

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[1] The statements required by Rule 28.1 of this Court are contained in the Appendix to this Petition (1a-5a). The Appendix to this Petition is, in part, bound together with the Petition and, in part, bound in two additional volumes. References to the Appendix are cited herein as "____a."

[2] The Court of Appeals affirmed the District Court's grant of summary judgment in favor of defendants Sony Corporation, Sony Corporation of America, Motorola, Inc., and Sears Roebuck & Co. (183a-185a). These companies are designated as respondents pursuant to Rule 19.6 of this Court. Unless indicated otherwise, however, references to "respondents" in the Petition do not include these former defendants.

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Petitioners respectfully request that writ of certiorari be issued to review the decisions and judgments of the United States Court of Appeals for the Third Circuit, entered on December 5, 1983, which reversed the decisions of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of petitioners against respondents' antitrust and antidumping claims.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 723 F.2d 238 (34a-197a) and 723 F.2d 319. (198a-223a). Upon petition for rehearing in banc, and motion requesting that said petition be acted upon by all circuit judges in regular active service, the Court of Appeals issued separate unreported orders. (234a and 235a). The opinions of the District Court granting summary judgment are reported at 494 F. Supp. 1190 (1111a-1214a) and 513 F. Supp. 1100. (236a-667a). The District Court's evidentiary opinions are reported at 505 F. Supp. 1125, 505 F. Supp. 1190 and 505 F. Supp. 1313. (668a-776a; 777a-987a; and 988a-1109a).

JURISDICTION

The judgments of the Court of Appeals were entered on December 5, 1983. (224a-228a and 229a-233a). Timely petitions for rehearing and rehearing in banc were denied on March 9, 1984. This Court has jurisdiction to review the judgments of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaints allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, the Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72, section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and section 7 of the Clayton Act, 15 U.S.C. § 18. (27a-32a).

STATEMENT OF THE CASE

At the core of this enormous case is the allegation of plaintiff-respondents National Union Electric Corp. ("NUE") and Zenith Radio Corp. ("Zenith") that petitioners and almost one hundred other foreign and domestic firms participated in a twenty-year "unitary" conspiracy to drive U.S. manufacturers of consumer electronic products ("CEPs") out of business by selling television receivers and other CEPs at artificially high prices in Japan for the purpose of creating a "warchest" to fund an agreement to sell the same products at artificially low prices in the United States.[1] (45a-46a; 258a).

[1] Respondents brought suit in the District Court pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and section 801 of the Revenue (Antidumping) Act of 1916, 15 U.S.C. § 72, against twenty-four named defendants: seven Japanese manufacturers of television receivers (including Sony Corporation); four Japanese trading companies; one Japanese component manufacturer; ten American subsidiaries of the Japanese defendants; a former American television manufacturer (Motorola); and an American retailer which purchased Japanese television receivers for resale (Sears Roebuck & Co.). Additionally, respondents identified seventy-three other organizations as "co-conspirators," including almost every corporation in Japan, the United States and throughout the world that manufactured or sold CEPs in or to the U.S. market during the 1950's, 1960's and 1970's—except, of course, NUE and Zenith.

1. *The District Court Proceedings.* The thirteen-year history of this litigation, in which billions of dollars in alleged damages are being sought by the respondents (665a), is amply described in the District Court and Court of Appeals decisions. (45a-56a; 243a-285a). The huge volume of documents, interrogatory answers and deposition transcripts generated by this litigation, led then District (now Circuit) Judge Edward R. Becker—the seventh district court judge to sit on the case—to implement a series of widely heralded case management procedures in an attempt to narrow and focus the issues being pressed. (64a). Pursuant to such procedures, respondents' entire case was set forth with preclusive effect in their Final Pretrial Statement ("FPS"), filed in the wake of more than eight years of discovery. (269a-273a).

After the filing of motions for summary judgment by all defendants, the District Court held five weeks of evidentiary hearings that resulted in the issuance of three separate evidentiary opinions. (668a-776a; 777a-987a; 988a-1109a). In one of these opinions, the District Court excluded significant portions of the expert testimony proffered by respondents on the ground that, among other things, it was based upon factual assumptions which the District Court found to be unsupported or false. (1058a-1060a; 1065a-1077a).

Thereafter, following two weeks of summary judgment arguments, and after combing the record for all possible evidence in support of respondents' claims, the District Court granted petitioners' motions for summary judgment, concluding that there was no evidence from which a fact finder might either directly find or reasonably infer the conspiracy alleged. (621a-622a).[4] This conclusion was in complete accord with the

[4] The District Court's conclusion that there was no evidence from which a fact finder might find or infer the conspiracy alleged was not dependent upon its opinions concerning the admissibility of respondents' evidence. Instead,

views of the Antitrust Division of the Department of Justice, which, at respondents' request, spent six months reviewing respondents' "best evidence," only to conclude that there was "no evidence of concerted predatory conduct [by petitioners] intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time."[5]

With regard to the home-market aspect of the alleged conspiracy, the District Court concluded that some evidence of a limited agreement to stabilize prices in Japan for a two-year period (1964 to 1966) did not, absent *any* evidence of a connection between petitioners' home-market behavior and petitioners' export sales, permit the inference necessary to support respondents' unitary conspiracy theory, *i.e.*, that the purpose and effect of the alleged home-market agreement was to fund a twenty-year "low price" export conspiracy. (385a-386a; 462a-463a; 608a; 615a-616a).

The District Court next turned to the "parallel" pricing behavior and other circumstantial evidence relied upon by respondents as a basis for inferring the "export side" of the alleged conspiracy. Respondents argued that, despite the uncontested fact that the alleged conspirators sold at every price level in the United States, "ranging from the lowest to the highest" (476a n.202), a "low price" export conspiracy could be inferred from petitioners' purported charging of lower prices in the United States than in Japan, from the granting of "secret

giving respondents the benefit of every reasonable doubt, the District Court reached its summary judgment decision only after it either assumed the admissibility of respondents' proffered evidence, or considered substantially equivalent evidence in support of each of respondents' key factual propositions (402a; 418a; 436a n.167; 438a n.168; 442a-443a; 447a; 453a; 456a; 473a-474a; 488a-489a n.211; 496a n.221; 523a-524a; 605a-608a).

[5] Statement by John H. Shenefield, Assistant Attorney General, Antitrust Division, before the Senate Judiciary Committee, 3-4 (April 12, 1978). (21a-24a at 23a).

rebates," and from other allegedly "parallel" behavior in the United States.

Applying the established standard for determining when an inference of conspiracy is permissible from parallel acts and other circumstantial evidence, as set forth by this Court in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) ("*Cities Service*"), as well as in the decisions of other federal courts, the District Court found that there was no evidence that petitioners had acted contrary to their independent economic interests. (475a-480a; 495a-498a; 522a; 610a). Moreover, the District Court found that there was no evidence to support a rational motivation by any of the petitioners to enter into the unique "low price" export conspiracy alleged by respondents—to sell CEPs in the United States, not at any particular "low price" or level, but at whatever "low prices" were "necessary to get the business." (478a n. 204). "[C]ompanies do not need to conspire to sell at [low] prices 'necessary to get the sale'," the District Court concluded, because that is exactly the individual motivation and result one would expect from free and unfettered competition *without any agreement*. (479a).[6]

The District Court further held that no agreement to charge artificially low United States prices could be inferred from petitioners' participation in Japanese government-mandated export control arrangements prohibiting them from selling below specified *minimum* prices and, according to respondents, limiting the number of petitioners' United States export customers, since such arrangements could only have had the effect of *raising* export prices—the exact opposite of respondents' "low price" conspiracy claims. (303a-385a). Consequently, the District Court did not determine whether the act of

[6] The District Court also found that there was no evidence to support a rational motivation by petitioners to enter into a conspiracy to attempt to monopolize the United States television receiver market, because it was plain from the record that any such conspiracy would have been recognized as futile. (484a).

state and sovereign compulsion doctrines prevent a United States court from holding a Japanese company's participation in such export controls to constitute or be a feature of a violation of United States antitrust law. It did, however, note the existence of the official pronouncement of the Ministry of International Trade and Industry of the Government of Japan ("MITI"), transmitted to the District Court through diplomatic channels in 1975 (the "MITI Statement," 6a-14a). That statement attested to the fact that petitioners' participation in such controls was *mandated* by MITI as an integral part of Japanese foreign trade policy. (387a-390a).

In sum, the District Court concluded that there was nothing in the record that made petitioners' "parallel" business behavior more consistent with an inference of the alleged conspiracy than with an inference of independent action. (478a). The district court therefore granted summary judgment in favor of petitioners on all of respondents' antitrust claims.[7]

2. *The Court of Appeals Proceedings.* On appeal, all but two of the Third Circuit judges apparently recused themselves. A panel consisting of the remaining two judges, plus one circuit judge from the Second Circuit, reversed.

a. The panel created a new legal standard under which plaintiffs alleging an antitrust conspiracy based upon parallel acts and other circumstantial evidence can survive a motion for summary judgment without satisfying the standard set forth by this Court in *Cities Service* for inferring a conspiracy from such evidence. In particular the panel held that because, as part of respondents' mix of circumstantial evidence, there was "direct evidence of some kinds of concert of action" (*i.e.*, two years of alleged price stabilization in Japan and the MITI-mandated export control arrangements), although not of the "unitary" conspiracy alleged to be unlawful, the normal

[7] The District Court also granted summary judgment in favor of petitioners with respect to respondents' claims under the 1916 Antidumping Act. (1111a-1214a; 632a n.372).

"limitations of the inference-drawing process" do not apply to this case. (165a-166a; 172a-175a). Consequently, the panel held that the export side of the alleged unitary conspiracy could be inferred from petitioners' "parallel" behavior and other circumstantial evidence despite the fact that the panel did not reject (or even review) the express finding of the District Court that petitioners' U.S. market behavior was completely consistent with rational independent action and far more consistent with an inference of competition than with the requested inference of conspiracy.

b. The panel disregarded the official statement of the Government of Japan (the MITI Statement, 6a-14a) attesting to the fact that the export control arrangements relied upon by the panel to reverse summary judgment were mandated by the Japanese Government acting within its sovereign powers.[8] In holding that a fact finder could consider such government-mandated conduct to constitute a central "feature" of a U.S. antitrust law violation, the Court of Appeals decision did not even mention the MITI Statement. (166a-168a; 177a-179a; 188a-189a).

c. The panel also reversed the District Court's exclusion of significant portions of respondents' expert testimony. According to the panel, the District Court was without discretion to exclude this testimony despite its finding that, among other things, it was based upon demonstrably false and unsupported factual assumptions. The panel did not reverse or review these findings by the District Court. Instead, it held that the District Court was obliged to accept respondents' expert testimony as

[8] Thus, the panel premised its conclusion that a fact finder might infer an actionable conspiracy in violation of U.S. law on petitioners' participation in: (i) regulations of the Japan Machinery Exporters Association ("JMEA") requiring the registration, and limiting the number, of United States customers to whom Japanese television exporters were permitted to sell (the so-called "five-company rule") (178a; 180a); and (ii) arrangements establishing the minimum prices at which Japanese television manufacturers were permitted to export certain products to the United States. (179a).

admissible to defeat summary judgment—regardless of its findings concerning the truth of the factual assumptions upon which the testimony was based—so long as the experts stated that the data relied upon in forming their opinions were "of a type" reasonably relied upon by other experts in their respective fields and there was no contrary expert testimony on this issue. (102a-106a).

d. Finally, in a separate opinion handed down on the same day, the panel also reversed the District Court's dismissal of respondents' claims under the Antidumping Act of 1916. Applying its unprecedented standard for inferring a conspiracy to the 1916 Act, the panel held that respondents had established a *prima facie* case of concerted action that would satisfy the specific predatory intent requirement of that Act. (219a-221a). If this Court reverses the antitrust judgment of the Court of Appeals, it would thus necessarily reverse the Antidumping Act judgment as well.

e. Apparent recusals by every member of the Third Circuit, other than the two who sat on the panel, precluded in banc review. Petitioners' request to the Third Circuit judges to reconsider their recusals in ruling upon petitioners' request for an in banc rehearing was denied, as was their petition for a rehearing by the panel. (234a; 235a).

This Court thus provides the *only* opportunity for petitioners to obtain review of the panel's decision before this case is remanded for years more of unnecessary, costly and burdensome litigation.

REASONS FOR GRANTING THE WRIT

The clear-cut legal questions presented by this closely followed, precedent-setting litigation are precisely the type of controlling issues—which are both "fundamental to the further conduct of the case" and of paramount public policy concern—that warrant interlocutory review by this Court. *See, e.g.*,

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 643-44 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 725-27 (1975); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

In particular, the decision below warrants immediate review because: (i) it signals a significant retreat from the increasingly effective use of summary judgment in unmeritorious antitrust conspiracy cases and thus threatens to encourage antitrust actions brought by competitors for the purpose of frustrating competition, rather than preserving it; and (ii) it is in sharp conflict with the standard established by this Court and by other courts of appeals for inferring a conspiracy from parallel business conduct and other circumstantial evidence. (Point I).

In addition, by permitting a fact finder to consider the government-mandated participation of Japanese nationals in export control arrangements a critical "feature" of a U.S. antitrust law violation, and by ignoring an official statement of the Japanese Government, the Third Circuit panel has failed to give effect to the act of state and sovereign compulsion doctrines. The opinion of the Court of Appeals intrudes upon the conduct of U.S. foreign relations and raises serious policy issues that require prompt review by this Court. (Point II).

Finally, the decision of the Third Circuit panel eliminates the discretion of federal trial judges to exclude from evidence, for purposes of summary judgment or trial, expert testimony that they find to be based upon false or unsupported factual assumptions. If permitted to stand, this ruling will make it virtually impossible for district courts to grant summary judgment in any case, large or small, in which expert testimony plays a material role. (Point III).

I.

Certiorari Should Be Granted To Review The Unwarranted Exception That The Court Of Appeals Has Created To This Court's Controlling Standard For Inferring An Antitrust Conspiracy From Parallel Acts And Other Circumstantial Evidence

The Third Circuit has created an elastic exception to this Court's standard for inferring an antitrust conspiracy in cases resting upon parallel conduct and other circumstantial evidence. This exception poses a serious threat to competition policy. It would empower the lower courts to dispense with this Court's clear rule in *Cities Service* for inferring an antitrust conspiracy from such evidence and would thus make it considerably more difficult to dispose of unfounded antitrust conspiracy claims prior to trial. Moreover, the panel's ruling cannot be reconciled with the decisions of this Court, as well as those of other circuits, making review by this Court necessary to provide uniformity in this important area of antitrust policy.

1. The actionable conspiracy that the Third Circuit would permit a fact finder to infer in this case is a unitary conspiracy in which the participants agreed to stabilize prices in Japan, "coupled" with an agreement by the conspirators to allocate among themselves customers in the United States, so as to permit the conspirators to "concentrate their predatory tactics [*i.e.*, their alleged agreement to sell at artificially low prices] on separate selected" customers in the United States, while "insulated from price competition at home and from Japanese competition here." (168a). As the District Court and the Court of Appeals both concluded, the fact finder in this case must infer the above conspiracy from "parallel" acts and other circumstantial evidence (including "direct evidence of some kinds of concert of action," but not of the conspiracy alleged). (165a-166a; 257a-263a).

To avoid the risk of impermissible speculation, this Court has held that antitrust plaintiffs seeking to infer a conspiracy from parallel acts and other circumstantial evidence must demonstrate that the challenged conduct is contrary to the

independent self-interest of the defendants, and therefore *more* consistent with an inference of the alleged conspiracy than with an inference of independent behavior. *See, e.g., Cities Service*, 391 U.S. at 280; *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537 (1954).[9] The District Court applied this test with painstaking care to respondents' evidence below. For reasons which were meticulously set forth in its opinion, the District Court concluded that petitioners' alleged "parallel" acts (*e.g.*, the charging of lower prices in the United States than in Japan, the granting of secret rebates) were precisely the kind of independent behavior in each firm's economic self-interest that would be expected as a result of *competition*, not conspiracy. (478a-479a; 497a-502a). This conclusion was not even reviewed by the Court of Appeals.

Instead, the Third Circuit panel announced a new rule of law in which the presence of "direct evidence of some kinds of concert of action," although not of the conspiracy alleged, renders inapplicable this Court's established standard for inferring an antitrust conspiracy from parallel acts and other evidence. (165a-166a; 172a-175a). Indeed, in reversing the summary judgment decision, the Court of Appeals did not even consider whether the alleged "parallel" behavior was in each of the petitioners' individual economic self-interest, as the District Court had found, or whether an inference of conspiracy was more compelling than an inference of unilateral action.

This new interpretation of antitrust conspiracy law directly conflicts with the decision of this Court in *Cities Service* (which was not even mentioned in the panel's opinion). Specifically, in *Cities Service*, this Court set forth the controlling standard for inferring an antitrust conspiracy not only from parallel acts, but from the combination of those acts with other

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[9] *See also Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1473 (1984) (plaintiffs seeking to infer a vertical price fixing conspiracy must produce evidence "that tends to exclude the possibility of independent action").

circumstantial evidence—including, in that case, an agreement between Cities Service and one of its alleged co-conspirators relating to Kuwait oil, negotiations between Cities Service and the other alleged co-conspirators to join an oil consortium, and various other kinds of "direct evidence" of concert of action, but not of the conspiracy alleged. 391 U.S. at 263-64, 276, 283-85, 286-87. Indeed, after expressly noting that the petitioner in *Cities Service* did "attempt to point to *other evidence* besides the simple [parallel] failure to deal as showing the conspiracy," *id.* at 280 (emphasis added), this Court affirmed summary judgment in favor of Cities Service, holding that:

> the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to the conspiracy, thus negating the probative force of the evidence showing such a failure . . . .

Id.

As recently explained by this Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1470 (1984), if an inference of concerted price fixing may be drawn from ambiguous evidence, there is a considerable danger that lawful and pro-competitive conduct will be deterred or penalized. For this reason, it is particularly important that the *Cities Service* standard be given consistent application to prevent innocent and pro-competitive "parallel" pricing behavior from being condemned.

The Third Circuit's opinion also conflicts with decisions in other circuits that have applied the *Cities Service* inference standard in cases such as this. *See, e.g., Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (affirming summary judgment despite proof not only of parallel interest rates, but also of opportunities to conspire, periodic discussions of rates, an agreement among the alleged conspirators establishing a compatible credit card system, and other direct evidence of some kinds of concert of action, where collusion was not the "compelling . . . rational inference" and where legitimate business

reasons explained the pricing practices); *Proctor v. State Farm Mut. Auto Ins. Co.*, 675 F.2d 308, 334-35 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982) (affirming summary judgment where, despite claims of "direct evidence" of collusion, including meetings and communications among the defendants, the challenged parallel acts were found to be "in the economic self-interest of each of the individual [defendants]").[10]

The "direct evidence of some kinds of concert of action" relied upon by the panel (*i.e.*, the minutes of meetings and other documents relating to alleged price stabilization in the Japanese domestic market for the two-year period 1964-66, and the MITI-mandated minimum price arrangements and "five-company" rule) is not "direct evidence" of the alleged twenty-year conspiracy to destroy United States competitors by selling at artificially low export prices. Rather, as the Third Circuit itself conceded, such "concert of action" is merely another category of circumstantial evidence, combined with the evidence of asserted "parallel" acts, from which a fact finder would be asked to infer the conspiracy alleged. (165a-166a). Thus, none of this "direct evidence" supports the Third Circuit's conclusion that the normal "limitations of the inference-drawing process" do not apply to respondents' claims. (165a).

Indeed, neither of the categories of "direct evidence" of concert of action relied upon by the panel provides *any* support for respondents' claims of a "low price" export conspiracy. The MITI export controls, aside from being government-mandated, set *minimum* prices and, according to respondents, allocated customers—practices which, as the District

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[10] *See also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982) (affirming summary judgment where the plaintiff could not show that the "allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment"); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975) (affirming summary judgment where "parallel conduct is consistent with independent competitive decisions or at most reflects a non-consensual decision not to compete").

Court found, could have led only to *higher* export prices. (324a-329a).

As for the alleged home-market price stabilization, it is well established that evidence of participation in one agreement cannot be utilized to infer participation in another agreement, at least in the absence of any independent probative evidence to connect the two. *See, e.g., Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 435 (5th Cir. 1977); *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173, 186 (D.C. Cir. 1965); *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963). The District Court's express finding that there was no evidence of such a connection between the alleged home market price stabilization and petitioners' exports to the United States (385a-386a; 460a-463a; 608a; 615a-616a) was not questioned by the Court of Appeals.

Moreover, as explained in greater detail below (pp. 15-16 *infra*), there is no rational basis for inferring the existence of a money-losing, "low price" export conspiracy from an alleged "high-price" conspiracy in Japan. The Third Circuit apparently would permit the trier of fact to draw such an inference by speculating that the additional profits generated by a price-stabilizing conspiracy in one market might induce the participants to agree to fix artificially low prices and incur losses in another market. (176a-177a). Such conduct, however, would make no sense. A rational business firm will not throw away money on a losing venture that it could profitably invest elsewhere merely because it has accumulated profits in another market. 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 719a (1978).

The Third Circuit's reliance upon the above so-called "direct evidence" of "concert of action" thus cannot justify its new exception to the *Cities Service* standard. The panel's ruling, which permits the fact finder to *speculate* that companies that allegedly agreed to stabilize prices in their home market would also agree to fix artificially low export prices for more than twenty years—*without any evidence of export conduct*

inconsistent with vigorous competition or against economic self-interest—cannot be reconciled with this Court's decisions in *Cities Service*, *Theatre Enterprises* and *Monsanto*.

2. The need to adhere to the *Cities Service* rule is particularly compelling in a case, such as this, involving competitors' allegations of a "*low price*" conspiracy. Competition resulting in sales at "low prices" is the ultimate goal of our antitrust policy. That goal should not be undermined by exceptions to this Court's clear standard for inferring an antitrust conspiracy.

Claims of conspiracies to sell at "low prices" require particular scrutiny by the courts. Unlike price-elevating schemes, which confer direct and immediate benefits upon sellers, putative "predatory" pricing schemes, which impose substantial costs upon sellers, provide no such incentives.[11] Here, respondents are competitors whose basic complaint is that they have been injured by "low" pricing from foreign manufacturers seeking to enter the United States market. In such circumstances, there is no rational basis for inferring a conspiracy from the so-called "parallel" act of each Japanese competitor in charging lower prices in the U.S. than in Japan. Indeed, as the District Court found, this is precisely what any new entrant would be expected to do in order to get established in a new market. (478a-480a).

Moreover, the panel's conclusion that normal "limitations of the inference drawing process" do not apply to this case (165a) made it unnecessary for the panel to consider whether there could ever be any rational motive by petitioners to enter into the alleged conspiracy to charge artificially low prices in order

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[11] *See* R. Bork, *The Antitrust Paradox*, 148-54 (1978) ("A firm contemplating predatory price warfare will perceive a series of obstacles that make the prospect of such a campaign exceedingly unattractive. . . . [P]redation by such techniques is very improbable."); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 711b (1978) ("The prospects of an adequate future payoff . . . will seldom be sufficient to motivate predation."); *see also* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 336 (1981); McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289, 294, 300 (1980).

to drive all American manufacturers of television receivers out of business and then charge monopoly prices to recoup their losses. The District Court, which did examine the record on this issue, concluded that:

> [T]he defendants, new entrants with still relatively small market shares, could not rationally hope to recoup their alleged losses in the United States in view of the dominant market positions held by RCA and Zenith and the ability of the European manufacturers, other far eastern companies, and major American firms swiftly to increase their United States CEP sales if higher monopoly prices were ever charged.

(611a). The Court of Appeals did not review this conclusion. Instead, it simply permitted the fact finder to speculate that petitioners would have entered into a conspiracy with such an irrational objective—a result directly contrary to the *Cities Service* standard. Indeed, the conspiracy alleged by respondents would have been an especially irrational endeavor for foreign competitors, like petitioners, who could hardly have hoped to achieve a monopoly of U.S. markets in light of the political and legislative restraints and other barriers to imports that have been and can be so readily erected.

Acceptance of the panel's inference standard would encourage protectionist-minded U.S. competitors to bring treble damage actions whenever a number of foreign manufacturers attempt to compete in the United States with prices claimed to be lower than their prices in the home market. If antitrust plaintiffs are able to defeat summary judgment on the basis of such conduct, there is a serious risk that competition will be affirmatively *suppressed*. *See, e.g., Monsanto*, 104 S. Ct. at 1470; *United States v. United States Gypsum Co.*, 438 U.S. 422, 456-58 (1978).[12] Indeed, as the District Court found (478a-

[12] *See also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (courts must "be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition"); *Buffalo Courier-Express,*

479a; 609a-610a), the alleged "low price" conspiracy in this case is sought to be inferred from the very type of pro-competitive "parallel" behavior that the antitrust laws are designed to encourage, rather than condemn (low prices, secret rebates, etc.). Providing for the uniform application of the *Cities Service* inference standard to this type of case is thus all the more important to the competition policy embodied in our antitrust laws.

3. Finally, the Third Circuit's unprecedented exception to the *Cities Service* standard unravels in one stroke what years of case law and scholarly work have only recently accomplished—the use of summary judgment as a meaningful tool for managing large and complicated antitrust cases.[13] This result directly undermines the decisions of this Court, and those of other circuits, which have recognized that because of the enormous burden that complex antitrust cases often place on the judiciary, and the chilling effect which vexatious treble damage actions can have on competition, such cases need to be carefully managed by the district courts—and that summary disposition may often be the best tool for achieving this end. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *Cities Service*, 391 U.S. at 289-90.[14] Unless this Court grants

Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition.").

[13] *See, e.g.*, 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 316 at p. 57; Schwarzer, J. (N.D. Cal.), *Techniques for Identifying and Narrowing Issues in Antitrust Cases*, 51 Antitrust L.J. 223, 226 (1982); Statement of the American College of Trial Lawyers, 90 F.R.D. 207, 226 (1981); Report of the National Commission for Review of Antitrust Law and Procedures, 80 F.R.D. 509, 565 (1979); Rogers, *Summary Judgment in Antitrust Conspiracy Litigation*, 10 Loy. U. of Chi. L.J. 667, 689 (1979).

[14] *See also Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) ("The very nature of antitrust litigation would encourage summary disposition . . . when permissible. . . . The statutory remedy of treble damages creates a special temptation for vexatious litigation. Also, antitrust actions have been proven to be especially protracted and difficult for jury consideration."); *Comet*

certiorari to review the Third Circuit's erroneous legal ruling, district courts will almost certainly be encouraged to conclude that they should forego the massive effort that is generally required to bring large antitrust conspiracy cases under control in order to determine whether summary judgment is appropriate.

The Department of Justice repeatedly has urged this Court to adopt rigorous standards for inferring an antitrust conspiracy and to avoid what the Third Circuit panel has wrought here—a rule that a price-fixing conspiracy may be inferred from parallel acts without any evidence that the "behavior is inconsistent with individual self-interest and thus unlikely to occur without collusion." Brief for the United States as Amicus Curiae at 8-10, 11, *Weyerhaeuser v. Lyman Lamb Co.*, 456 U.S. 971 (1982), *granting cert. to* 655 F.2d 627 (5th Cir. 1981), *cert. dismissed*, 103 S. Ct. 3100 (1983).[15] Just last Term, this Court granted certiorari in *Weyerhaeuser* to address this very issue, but was deprived of the opportunity to do so by the settlement of that case. Before the parties in this case—and the judicial system—are consigned to years more of

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Mechanical Contractors, Inc. v. B.A. Rasmussen Constr., Inc., 609 F.2d 494 (10th Cir. 1980); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1197 (5th Cir. 1979); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977); *Modern Home Inst., Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975).

[15] *See also* Brief for the United States as Amicus Curiae at 7-10, *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 455 U.S. 988 (1982), *denying cert. to* 641 F.2d 457 (7th Cir. 1981) (summary judgment was appropriate in an antitrust conspiracy case where there was no proof of conduct against individual economic self-interest, even though the plaintiff offered evidence of identical pricing behavior, close personal ties, opportunities to conspire, discussion of prices and other forms of concert of action among the alleged conspirators); Brief for the United States as Amicus Curiae in Support of Petitioner at 9-10, *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984) ("To infer concerted action [in the absence of direct evidence of collusion] requires a showing that the conduct is not in the individual self-interest of the participants, acting independently, and is in their collective and self-interest only when they coordinate their actions.").

unnecessary and costly litigation under an erroneous legal standard, certiorari should be granted to resolve this controlling issue.

II.

Certiorari Should Be Granted To Provide Prompt Review Of The Court Of Appeals' Failure To Give Effect To An Official Statement Of The Japanese Government Attesting That Certain Conduct Of Petitioners Relied Upon By The Court To Reverse Summary Judgment Was Mandated By The Government Of Japan

The panel's decision also requires immediate review because it conflicts with numerous decisions of this Court, and other federal courts, applying the act of state and sovereign compulsion doctrines. The panel below treated this case as if it involved no inter-governmental or foreign policy ramifications at all. Yet, in reversing the District Court's summary judgment decision, the panel held that a fact finder could infer an unlawful conspiracy from, among other things, petitioners' participation in minimum price and customer registration arrangements (*i.e.*, the "five-company" rule) (176a-177a; 178a-179a) which the Japanese Government has attested were carried out pursuant to its sovereign mandate. (6a-14a).

The Court of Appeals' opinion would permit the fact finder to conduct a broad scale inquiry into the truthfulness of the Japanese Government's official diplomatic representations and, if so inclined, to disregard such representations in their entirety in order to conclude that conduct which the Japanese Government has stated that it mandated was actually a "feature" of a conspiracy in violation of U.S. law. The opinion represents a serious encroachment by the judiciary into issues of foreign relations reserved to the Executive Branch. It is imperative that this Court grant certiorari so that this issue can be reviewed prior to the time the District Court, on remand, is required to conduct the very inquiry into the validity and effect of foreign governmental pronouncements and policies that the act of state doctrine is intended to prevent.

1. As discussed below (pp. 21-24 *infra*), the sovereign compulsion and act of state doctrines preclude actions under United States law against the participation of Japanese nationals, in Japan, in export control arrangements mandated by the Japanese Government. Indeed, even the Third Circuit panel recognized this fundamental principle. (188a).

The Third Circuit did not apply this principle to bar respondents' challenge to the export control arrangements at issue because, in disregard of the decisions of this Court and other federal courts, it found that a fact finder could conclude that these arrangements were, in fact, not mandated by the Government of Japan. (178a; 188a-189a). Specifically, the panel postulated that a fact finder could conclude that: (i) these arrangements had only been "sponsored" or "encouraged" by the Government of Japan, rather than mandated (177a-178a); (ii) there is some doubt "that the minimum prices [contained in the manufacturers' agreements and referred to in the exporters' regulations] . . . were in fact determined by the Japanese Government" (188a-189a); (iii) "the Government of Japan merely provided an umbrella under which the defendants . . . fixed their own export prices" (189a); and (iv) the "five-company rule was the result of non-governmental action." (178a).

In order to reach these conclusions, however, the Court of Appeals had to ignore—indeed, it did not even mention—the Japanese Government's official pronouncement attesting to the mandatory nature and governmental character of all of the export control arrangements challenged by respondents. The MITI Statement conclusively established that:

> [T]he [minimum price] agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association [*i.e.*, the so-called five-company rule] . . . have come into existence pursuant to the direction of MITI

(8a); and that MITI gave the defendants:

> no alternative but to establish the agreement[s] and regulation[s] in compliance with the said direction.

(12a).

The panel's failure to give any effect to the MITI Statement is inexplicable. Not only did the panel fail to follow the long-established rule that an official pronouncement of a foreign sovereign attesting to the effect of governmental activities in which it was engaged must be accepted by a United States court as *conclusive* proof of the representations contained therein,[16] but it gave no weight to the MITI Statement at all.

In *United States v. Pink*, 315 U.S. 203 (1942), this Court considered whether an expropriation decree of the Russian government would be given extraterritorial effect over property located in New York. The Soviet Commissariat of Justice filed a statement with the Court explaining that the expropriation decree at issue was intended to have such an effect. The Court held that the representations contained in this official government statement were entitled to be given "*conclusive*" effect. *Id.* at 220 (emphasis added).

The policy behind this ruling can be found in the act of state doctrine.[17] The rationale of the doctrine—leaving the conduct of foreign affairs to the Executive Branch—would be frustrated if courts were permitted to determine whether or not to accept the official statements of a foreign government as

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[16] *See, e.g., United States v. Pink*, 315 U.S. 203, 218-21 (1942); *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 443-44 (2d Cir. 1940); *The Claveresk*, 264 F. 276, 280 (2d Cir. 1920); *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368-69 (2d Cir. 1919); *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280, 1283-85 (D. Del. 1976), *aff'd mem.*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *United States v. Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960); American Bar Association, Section of Antitrust Law, Antitrust Law Developments (Second) 562 n.272 (1984).

[17] *See Banco de Espana*, 114 F.2d at 443 ("It would seem to follow [from the act of state doctrine] that the statement that such [governmental] acts had taken place made to our courts officially on behalf of the friendly foreign government by its accredited representative, must be accepted as proof of

truthful. As explained long ago by the Second Circuit Court of Appeals in *The Claveresk*, 246 F. at 280, the official pronouncement of a foreign government "describing a certain act and avowing it as governmental, is to be taken as a verity."

Had the Third Circuit properly accorded conclusive effect to the MITI Statement's attestations that the challenged minimum price agreements and JMEA regulations were mandated by the Japanese Government as an integral part of its foreign trade policies, it could not have authorized a fact finder to consider such conduct to be a central "feature" of the alleged unlawful conspiracy.

2. Petitioners' participation in the MITI-mandated export controls is clearly protected under the sovereign compulsion doctrine. In recognition of the impropriety and unfairness of applying United States law to punish conduct undertaken at the direction of a foreign government, "sovereign compulsion" has been recognized as an absolute defense to an antitrust claim.[18] This principle, of course, is merely an international corollary to the well-established rule that the United States antitrust laws do not apply to private conduct compelled by state governments. *See, e.g., Hoover v. Ronwin*, 52 U.S.L.W. 4535, 4538-39 (May 14, 1984) (No. 82-1474); *Bates v. State Bar*, 433 U.S. 350, 359-63 (1977).

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that fact . . . ."); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. at 110 (inquiry into the validity of a decree by the Trucial State of Sharjah held barred by the act of state doctrine because it would breed "the very sources of diplomatic friction and complications that the act of state doctrine aims to avert.").

[18] *See, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976) ("corporate conduct . . . compelled by a foreign sovereign is protected from antitrust liability, as if it were an act of the state itself"); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F.Supp. 1291, 1296-98 (D. Del. 1970). This Court has also recognized the doctrine. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962). *See also* J. Atwood & K. Brewster, *Antitrust and American Business Abroad* §§ 8.14, 8.17-8.22 (2d ed. 1981); Restatement (Revised) of the Foreign Relations Law of the United States § 419 (Tent. Dr. No. 3 1982).

The Government of the United States has given its assurances to the Government of Japan that Japanese automobile manufacturers complying with export controls directed by MITI, similar to the MITI-mandated export controls challenged by respondents herein, would be protected from the United States antitrust laws under the sovereign compulsion doctrine.[19] As stated by Attorney General Smith to Japanese Ambassador Okawara: "compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese Government, acting within its sovereign powers" and thus "would not give rise to violations of United States antitrust laws."[20] The Assistant Attorney General in charge of the Antitrust Division has taken precisely the same position with respect to the very export control arrangements at issue in this case.[21]

3. The act of state doctrine prevents a United States court from entertaining an action that calls into question the validity of conduct or policies of a foreign government acting within its sovereignty.[22] Under established principles of separation of powers, the judiciary is not the appropriate branch of the government to adjudicate such "acts of state." *See Banco*

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[19] *See* Letter from Attorney General William French Smith to Ambassador Yoshio Okawara of Japan (May 7, 1981), *reprinted in* 1981-1 Trade Cas. (CCH) ¶ 63,998. (25a-26a).

[20] *Id.* at 26a.

[21] *See* Letter from Donald I. Baker, Assistant Attorney General, Antitrust Division, to Senator Edward M. Kennedy (February 16, 1977). (15a-23a).

[22] *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-03 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *International Ass'n of Machinists & Aerospace Workers (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S 1163 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). In circumstances such as those presented here, where the Third Circuit panel would permit a fact finder to disregard an official pronouncement of the Japanese Government and conclude that the participation of petitioners in mandatory export controls of the Government of Japan constitutes a "feature" of a United States antitrust law violation (176a-179a), the foreign trade policies of the Japanese Government itself are being challenged. This is precisely the type of judicial proceeding, involving an inquiry into the validity and effect of Japanese governmental policies, that the act of state doctrine is intended to prevent.

The United States and Japan have for over thirty years been engaged in negotiations to balance their competing trade interests. On many occasions, these negotiations have produced government-imposed controls on private citizens. The Third Circuit's ruling, permitting a fact finder to inquire into and treat conduct mandated by a foreign government as if it were private conduct subject to United States law, threatens the future course of this bilateral trade diplomacy. Certiorari should be granted to assure friendly foreign nations, like Japan, that the export conduct they compel by their own nationals, in their own territories, often at the request of the United States government, will not be made the basis for private treble damage actions under United States law, and to prevent the potential affront to the Japanese Government which will occur if a fact finder is permitted to ignore the MITI statement.

III.

Certiorari Should Be Granted To Preserve The Power Of Trial Courts To Manage Complex Cases Involving Expert Testimony

In reversing the District Court's exclusion of significant portions of respondents' expert testimony, the panel held that expert opinion which the trial court finds to be based upon false or unsupported factual assumptions must nevertheless be

admitted into evidence, and considered on a motion for summary judgment, so long as the expert states that the data he relied upon are "of a type" upon which other experts in his field reasonably rely, and there is no contrary expert testimony on this issue. (102a-106a). In so ruling, the Third Circuit has: (i) erected still another improper obstacle to the use of summary judgment in antitrust conspiracy cases; (ii) seriously undermined the ability of the federal courts to effectively manage trials involving expert testimony; and (iii) placed itself in direct conflict with the decisions of other circuits.

1. The District Court found that critical portions of respondents' expert testimony were based upon false or unsupported factual assumptions and therefore excluded that testimony from evidence. (1058a-1059a; 1065a-1076a).[23] Although the Third Circuit recognized that the District Court had made such findings (114a), it made no attempt to review them. Instead, it held that once an expert has filed a conclusory affidavit stating that the data upon which he relied in forming his opinion were of a type relied upon by other experts in his field, and no other expert has testified to the contrary on this issue, then the district court loses its power to exclude the expert testimony even if it finds it to be based upon factual assumptions that are indisputably false. (102a-105a; 114a).

The Third Circuit's error apparently stems from its belief that the "type of data" requirement of Fed. R. Evid. 703 is the only prerequisite to the admission of an expert opinion, and

[23] For example, Dr. DePodwin, one of respondents' experts, based a purported study of petitioners' price/cost relationships on what the District Court found to be a series of false factual assumptions flatly contradicted by the *only* record evidence on these points (including the expert affidavit of one of petitioner's executives). (1065a-1076a). Such assumptions, the District Court found, ignored the record evidence in order to "put the rabbit in the hat" and to "pre-ordain" the results of the study. (1070a). Indeed, in one instance, Dr. DePodwin's reliance upon demonstrably false assumptions caused him to conclude that one of the petitioners suffered massive "losses" on exports from two of its factories in Japan, even though the undisputed record showed that these factories *never* manufactured *any* products for export during the relevant period. (1065a n.58).

that this requirement is satisfied whenever an expert files an affidavit on this point that is not contradicted by an opposing affidavit. This ruling, however, conflicts with the decisions of other courts of appeals which have consistently held that expert testimony based upon false or unsupported factual assumptions must be excluded from evidence.

Even prior to the adoption of the Federal Rules of Evidence, federal courts were required to reject expert opinions based upon unsupported factual assumptions. *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 911-13 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). The Federal Rules did not change this requirement. To the contrary, Fed. R. Evid. 104(a) and 703 require district courts to make a factual inquiry into the bases of an expert's opinion, and decisions by courts of appeals subsequent to the adoption of the Federal Rules of Evidence have routinely excluded expert testimony when they have found it to be based upon false or unsupported factual assumptions. *See Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir. 1984); *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 364 (6th Cir. 1978); *Scheel v. Conboy*, 551 F.2d 41, 43-4 (4th Cir. 1977).

In *Shatkin v. McDonnell Douglas Corp.*, for example, the Second Circuit (per Judge Mansfield for a unanimous panel joined in by Judges Friendly and Kearse) affirmed the District Court's "discretionary right under Fed. R. Evid. 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony." 727 F.2d at 208. Similarly, in *Soden v. Freightliner*, the Fifth Circuit held that although experts have wide latitude in choosing the bases of their opinions, trial judges still must determine independently if the experts' underlying factual assumptions are reasonable. 714 F.2d at 505.[24]

[24] *See also Drayton v. Jiffee Chemical*, 591 F.2d at 364 (although an expert economist may generally base an opinion as to future earnings on factors such as "rates of interest, amounts and returns on investments, present earnings values, previous existing rates of inflation or deflation and change in the purchasing power of the dollar," it was error for a district court to receive an opinion based on such data "which will outrun any reasonable prediction").

In holding that a district court has the discretionary power to exclude expert testimony based upon false or unsupported factual assumptions, both the Second and Fifth Circuits directly relied upon the District Court's opinion herein. Thus, the Third Circuit's reversal of that opinion, and its creation of a different rule of admissibility, presents a square conflict among the circuits. This Court should grant certiorari to resolve this conflict and to rule on these important issues concerning the admissibility of expert testimony, which it has not addressed in the ten years since the adoption of the Federal Rules of Evidence. If the filing of a mere conclusory affidavit, stating that the data utilized by the expert is of the type reasonably relied upon by other experts in his field, can strip a district court of its discretion to prevent experts from testifying on the basis of false factual assumptions, trials involving complex economic or other expert testimony will become hopelessly unmanageable and unjust.

2. Not only did the Third Circuit permit expert opinions based on demonstrably false or unsupported assumptions to be admitted into evidence, it relied upon such opinions to create genuine issues of fact for purposes of reversing the summary judgment granted in favor of petitioners. (171a-175a). This ruling also conflicts with the decisions of other courts of appeals. *See United States v. Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977).

In *Merit Motors*, the D.C. Circuit, in holding that the existence of an expert opinion based upon "unsupported assumptions" was insufficient to create a genuine issue of material fact to defeat summary judgment, stressed that Rule 703 "was intended to broaden the acceptable bases of expert opinion, but it was not intended, as appellants seem to argue, to make summary judgment impossible whenever a party has produced

an expert to support its position." 569 F.2d at 673. Similarly, in *Various Slot Machines*, the Ninth Circuit held that summary judgment was properly granted notwithstanding an unsupported expert opinion that would have otherwise created a genuine issue of material fact. 658 F.2d at 700-01.

This further conflict between the Third Circuit and other courts of appeals should also be resolved. After more than eight years of discovery, and in a case in which the District Court has specifically found that the allegedly anticompetitive conduct of petitioners was actually far more consistent with an inference of competition than with an inference of conspiracy, respondents should not be permitted to defeat summary judgment on the basis of expert testimony premised upon false and unsupported factual assumptions. This Court should grant certiorari to prevent the Third Circuit's erroneous interpretation of the Federal Rules of Evidence from destroying all proper limitations on the use of expert testimony.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue writ of certiorari to review the judgments of the Court of Appeals for the Third Circuit.

Dated: June 7, 1984

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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

Appendix To
Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit
(1a-33a)

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Counsel for the
Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, N.Y.
Counsel for the
Sanyo Petitioners

June 7, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

APPENDIX TABLE OF CONTENTS

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Rule 28.1 Statement of Petitioners Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., and Matsushita Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., and Matsushita Electronics Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Matsushita Electric Trading Co., and/or Matsushita Electronics Corporation: Matsushita Communication Industrial Co., Ltd.; Matsushita Reiki Co., Ltd.; Victor Company of Japan; Kyushu Matsushita Electric Co., Ltd.; Matsushita Seiko Co., Ltd.; Matsushita Kotobuki Electronics Industries, Ltd.; Matsushita Electric Works, Ltd.; Miyata Industry Co., Ltd.; National House Industrial Co., Ltd.; Asahi National Lighting Corporation Ltd. Wakayama Precision Company; Precision Electronics Corporation; Matsushita Electric Co., (Malaysia) Bhd; Panasonic Hawaii, Inc.; and Quadracast Systems, Inc.

Rule 28.1 Statement of Petitioners Toshiba Corporation and Toshiba America Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Toshiba Corporation and Toshiba America Inc. submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Toshiba Corporation and/or Toshiba America Inc.: Toshiba Shoji Co., Ltd.; Toshiba Machine Co., Ltd.; Toshiba Ceramics Co., Ltd.; Toshiba Steel Tube Co., Ltd.; Tokyo Optical Co., Ltd.; Toshiba Glass Co., Ltd.; Toshiba Tungaloy Co., Ltd.; Maroon Electronics Co., Ltd.; Tokyo Electric Co., Ltd.; Toshiba Medical Systems Co.,

Ltd.; Nishishiba Electric Co., Ltd.; Shibaura Engineering Works Co., Ltd.; Kitashiba Electric Co., Ltd.; Toshiba Engineering & Construction Co., Ltd.; Onkyo Corporation; Toshiba Electronic Systems Co., Ltd.; Toshiba Components Co., Ltd.; Toshiba Silicone Co., Ltd.; Semp Toshiba Amazonas S.A. (Brazil); Toshiba Anand Batteries Ltd. (India); Ceylon Bulbs & Electricals Ltd. (Sri Lanka); Thai Toshiba Electric Industries Co., Ltd. (Thailand); Thai Toshiba Fluorescent Lamp Co., Ltd. (Thailand); Thai Toshiba Lighting Co., Ltd. (Thailand); Toshiba (Malaysia) Bhd. (Malaysia); Pars Tousheh Holding Co., Ltd. (Iran); Taiwan Television Enterprise Ltd. (Taiwan); Korea Electronics Co., Ltd. (Korea); Orion Electric Co., Ltd. (Korea); Han Kwang Electric Co., Ltd. (Korea); Leechun Electric Co., Ltd. (Korea); Tatung Co. (Taiwan); Taiwan Fluorescent Lamp Co., Ltd. (Taiwan); Toshiba de Panama S.A. (Panama); Toshiba Medical do Brasil Ltda. (Brazil); Toshiba International Company Ltd. (United Kingdom); Toshiba Medical Systems Ltd. (United Kingdom); Toshiba Medical Systems nv/sa (Belgium); Toshiba Medical Systems G.m.b.H. (West Germany); Toshiba (Schweiz) AG (Switzerland); Toshiba Medical Systems AG (Switzerland); Toshiba Medical Systems SrL (Italy); Toshiba Medical Systems S.A. (Spain); Man On Toshiba Limited (Hong Kong); Toshiba Electronics Taiwan Corp. (Taiwan); Toshiba Thailand Company Ltd. (Thailand); Toshiba Sales and Services Sdn. Bhd. (Malaysia); Toshiba International Corporation Pty., Ltd. (Australia); Toshiba Semiconductor Inc. (U.S.A.); Industria Mexicana Toshiba S.A. (Mexico); Toshiba do Brasil S.A. (Brazil).

Rule 28.1 Statement of Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and Hitachi Sales Corporation of America submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly owned United States and non-wholly-owned, publicly-traded foreign affili-

ates of Petitioners Hitachi, Ltd., Hitachi Kaden Hanbai Kabushiki Kaisha, and/or Hitachi Sales Corporation of America; Hitachi Cable, Ltd.; Hitachi Metals, Ltd.; Hitachi Chemical Co., Ltd.; Hitachi Construction Machinery Co., Ltd.; Hitachi Maxell, Ltd.; Babcock-Hitachi, K.K.; Hitachi Denshi, Ltd.; Japan Servo Co., Ltd.; Hitachi Kiden Kogyo, Ltd.; Hitachi Medical Corporation; Nippo Tsushin Kogyo Co., Ltd.; Asahi Kogyo Co., Ltd.; Hitachi Credit Corporation; Hitachi Plant Engineering & Construction Co., Ltd.; Hitachi Express Co., Ltd.; Nissei Sangyo Co., Ltd.; Nippon Business Consultant Co., Ltd.; Hitachi Printing Co., Ltd.; Hitachi Electronic Devices (Singapore) Pte., Ltd.; Hitachi Consumer Products (S) Pte., Ltd.; Hitachi Semiconductor (Malaysia) Pte., Ltd.; Tokyo Hitachi Katei Pomp Kabushiki Kaisha; Nagoya Higashi Hitachi Kaden Kabushiki Kaisha; Higashi Yasaguchi Hitachi Kaden Kabushiki Kaisha; Atago Sangyo Kabushiki Kaisha; Hitachi Sales Australia Pty., Ltd.; Hatsco, Ltd.; High Voltage Breakers, Inc.; Hitachi Instruments, Inc.; Hitachi Cable America, Ltd.; Hitachi Sales Corp. of Hawaii, Inc.; Hitachi Chemical Co. (America) Ltd.; American Magnetics, Inc.; Concise Casting Corp.; Hitachi Metals International Ltd.; HMI Export Corporation; Maxell America Inc., Maxell Corp. of America; Nissei Sangyo America, Ltd.; HISL, Inc.; HMSI, Inc.

Rule 28.1 Statement of Petitioners Mitsubishi Electric Corporation (MELCO) and Mitsubishi Electric Sales America, Inc.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc., submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Mitsubishi Electric Corporation and/or Mitsubishi Electric Sales America, Inc.: Nagoya Mitsubishi Electric Equipment Sales (Inc.); Kansai Mitsubishi Electric Products Sales (Inc.); Hokuriku Mitsubishi Electric Products Sales (Inc.); Bingo Electronic Computation Center (Inc.); Ryoei Facilities Service

(Inc.); Sowa (Inc.); Meldas System Engineering (Inc.); Shinbishi Electric (Inc.); Melco Overseas Service (Inc.); Kodensha (Inc.); Shimada Rika Industry (Inc.); Toyo Electric (Inc.); Nakayama Machinery (Inc.); Ryowa Trade and Industry (Inc.); Ryoden Elevator Facilities (Inc.); Mitsubishi Space Software (Inc.); Taku Industry (Inc.); Mecom Okitac Systems (Inc.); Toyo Machinery Industry Works (Inc.); Ryoko Computation Center (Inc.); Melcom Service (Inc.); Tanto Kosan (Inc.); Daito Industry (Inc.); Tyoden Industrial Machinery; Service Engineering (Inc.); Mitsubishi Industrial Software (Inc.); Sanwa Electric (Inc.); Melco de Mexico S.A. de C.V.; Ascenseurs Mitsubishi France S.A.; United Electronic Engineering Corp. (pte) Ltd.; Ryoden (Singapore) Pte. Ltd.; Ryoden Merchandising Co., Ltd.; Melco de Colombia Ltda.; Mitsubishi Electric Saudi Ltd.; Kanagawa Electric (Inc.); Daiichi Electric Industry (Inc.); Shizuki Electric Works (Inc.); Ryoden Trading (Inc.); Nippon Kentetsu (Inc.); Shin Yeong Electric Corporation.

Rule 28.1 Statement of Petitioners Sharp Corporation and Sharp Electronics Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Sharp Corporation and Sharp Electronics Corporation submit the following statement. The following companies are the parents, non-wholly owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Sharp Corporation and/or Sharp Electronics Corporation: Hycom, Inc.; Sampo Corp.; Sharp Electronics Consumers Corp.; and Sharp Finance Corp.

Rule 28.1 Statement of Petitioners Mitsubishi Corporation and Mitsubishi International Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Mitsubishi Corporation and Mitsubishi International Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Mitsubishi Corporation and or Mitsubishi International Corporation: B&H Corporation: MIC Petroleum, Inc.; Non-Ferrous International Corporation: Palmco, Inc.; AGPEX, Inc.; El Vic Farm Corporation; Japan Aircraft Maintenance (America), Inc.; Mitsubishi International Warehouse Corporation; Petro Diamond, Inc.; The R.J.M. Company; Sunstar Rubber Industries Corporation; Dahlia Mining Co., Ltd.; MC Minerals Corporation; Chino Mines Company; Diamond Vision Inc., U.S.A.; Mitsubishi Motor Sales of America, Inc.; Machiney Distribution, Inc.; Dosanko Foods Inc.; Caribe Isoprene Corporation; MCF Footwear Corporation; Nitto Seifun K.K.; Chuukyoo Coca Cola Bottling; G.S. Steel Co., Ltd.; Mitsubishi Motors Australia, Ltd.; Crestorook Forest Industries, Ltd.

Rule 28.1 Statement of Petitioners Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric, Inc., and Sanyo Manufacturing Corporation

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioners Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corporation submit the following statement. The following companies are the parents, non-wholly-owned subsidiaries, and non-wholly-owned United States and non-wholly-owned, publicly-traded foreign affiliates of Petitioners Sanyo Electric Co., Ltd., Sanyo Electric Trading Co., Ltd., Sanyo Electric Inc., and/or Sanyo Manufacturing Corporation: Fisher Corporation; Sanyo E & E Corporation; Sanyo Industries (America) Corporation; Sanyo Business Systems Corporation; Tokyo Sanyo Electric Co., Ltd. (Japan); Sanyo Industries (Malaysia) Bhd. (Malaysia); Autocrat Sanyo Holdings (New Zealand). In addition, Respondent Sears, Roebuck and Co. owns a 25.4% share of the stock of Petitioner Sanyo Manufacturing Corporation.

Letter From the Department of State to the United States District Court for the Eastern District of Pennsylvania, June 9, 1975

Department of State
Washington, D.C.

June 9, 1975

Clerk
United States District Court
U.S. District Court House
9th and Market Street
Philadelphia, Pennsylvania 19107

Dear Sir:

The Embassy of Japan has requested in a diplomatic note that the Department of State transfer to the court a statement of the Ministry of International Trade and Industry (MITI) of the Government of Japan in connection with two cases before the court, namely, *National Union Electronic Corp.* v. *Matsushita Electric Industrial Co., Ltd. et al.* (Civil Action *No. 74-3247) and Zenith Radio Corp.* v. *Matsushita Electric Co., Ltd. et al.* (Civil Action *No. 74-2451).* Copies of MITI's statement and the diplomatic note received from the Japanese Embassy are enclosed.

In carrying out this request of the Embassy of Japan, neither the Department of State nor the United States Government takes any position on the content of the statement or on any other aspect of the litigation in question.

Sincerely,
/s/ *Phillip R. Trimble*
Phillip R. Trimble
Assistant Legal Adviser for
Economic and Business Affairs

Enclosures:

(1) Statement of the Japanese Ministry of International Trade and Industry

(2) Diplomatic Note from the Embassy of Japan dated April 25, 1975.

Letter From the Embassy of Japan to the Department of State, April 25, 1975

April 25, 1975

E—21

The Embassy of Japan presents its compliments to the Department of State and has the honor to ask the latter to transfer to the United States District Court for Eastern District of Pennsylvania the attached statement concerning the two lawsuits between National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd. et al. (Civil Action No. 74-3247); and Zenith Radio Corporation v. Matsushita Electric Co., Ltd. et al. (Civil Action No. 74-2451).

Attachment

Statement of the Ministry of International Trade and Industry (MITI Statement)

The Ministry of International Trade and Industry of the Japanese Government ("MITI") has become aware that a number of Japanese television manufacturers and exporters are being sued by National Union Electric Corporation and Zenith Radio Corporation in the United States District Court for the Eastern District of Pennsylvania for alleged violations of various United States antitrust and antidumping laws in connection with their sales of television sets for export to the United States. (National Union Electric Corporation v. Matsushita Electric Industrial Co., Ltd., et al., Civil Action No. 74-3247 and Zenith Radio Corporation v. Matsushita Electric Co., Ltd., et al., Civil Action No. 74-2451.) In these lawsuits, questions have been raised concerning certain agreements entered into among the Japanese defendants, as well as certain regulations of the Japan Machinery Exporters Association, both such agreements and regulations have come into existence pursuant to the direction of MITI.

MITI has the honor to express its deep interest and serious concern regarding these lawsuits which involve issues related to its foreign trade policy and to call your attention to the following:

1. In order that Japanese exports do not cause unnecessary disruptions in the national economies of Japan's trading partners, one of the basic trade policies is to assure that Japanese exporting is carried on in as orderly a manner as possible. MITI is the government organ empowered and responsible for the detailed implementation of the said basic trade policy. Thus, Article 3 of the Law Concerning the Establishment of MITI (Law No. 275, 1952) sets forth the following administrative activities as being under the responsibility of MITI:

(1) Promotion and adjustment of international trade and control of foreign exchange relating to international trade (Article 3, Paragraph 1);

(2) Promotion of international cooperation in international trade and economic relations (Article 3, Paragraph 1-2).

Further, Article 4 of the Establishment Law defines the role of MITI as follows:

(1) Planning and programing of basic policies concerning production, distribution, consumption, trading, etc. of goods (included is electric power) under its jurisdiction (Article 4, Sub-section 1, Paragraph 13);

(2) To export and import (Article 4, Sub-section 1, Paragraph 16);

(3) To restrict or prohibit export or import (Article 4, Sub-section 1, Paragraph 17);

(4) To take the steps necessary to execute agreements and arrangements concerning international trade (Article 4, Sub-section 1, Paragraph 18);

(5) To prohibit or restrict transactions, etc. in foreign exchange relating to international trade (Article 4, Sub-section 1, Paragraph 20);

(6) To sanction exporters' agreements, importers' agreements and agreements of either manufacturers or distributors concerning export products, to sanction matters to be complied with members of export associations or import associations (hereinafter referred to as "Association Regulations"), to sanction collective agreements among the said members and matters to be complied with members of export-import associations, and to supervise designated agencies. (Article 4, Sub-section 1, Paragraph 24);

(7) To exercise such powers, other than those mentioned in the above items, as are placed under the jurisdiction of MITI by law (including orders issued thereunder) (Article 4, Sub-section 1, Paragraph 51).

2. Endowed with the said responsibilities and powers, MITI has developed under the law two basic procedures to achieve the aims of trade policy of the Government of Japan. The first procedure relates to MITI's regulatory powers provided for under the Export and Import Trading Law (Law No. 299, 1952) and the second relates to regulatory powers under the

Foreign Exchange and Foreign Trade Control Law (Law No. 228, 1949). The purpose of the Export and Import Trading Law is to promote the sound development of foreign trade by preventing unfair export trading and by establishing an orderly system for export and import trading. The purpose of the Foreign Exchange and Foreign Trade Control Law is to promote the proper development of foreign trade by providing for the control of foreign exchange, foreign trade and other foreign transactions.

In order to promote the sound development of foreign trade MITI applies both laws as follows: If some measures are deemed necessary to achieve the purposes mentioned above, MITI will generally first direct the relevant Japanese industry or trade association to enter into Arrangements (which include both manufacturers' agreements and association regulations) pursuant to the Export and Import Trading Law.

Where this procedure is deemed to be insufficient for the purpose of achieving these trade policy objectives (for example, where there is insufficient time to complete the contemplated arrangements), MITI will exercise its powers provided for in the Export Trade Control Order (Cabinet Order No. 378, 1949) under the Foreign Exchange and Foreign Trade Control Law, without prior direction to the industry or trade associations to enter into such Arrangements.

As stated above, such Arrangements concluded under the Export and Import Trade Law and carried out under the direction of the Minister of International Trade and Industry in order to assure orderly Japanese exportation activities are the actual implementation of MITI's trade policy itself. And since such direction by MITI, if disregarded, can be enforced by the power pursuant to the said Cabinet Order, it has in fact a compulsory power equivalent to law.

Once MITI has decided upon the trade policy measures to be taken and has directed the establishment of appropriate Arrangements under the Export and Import Trading Law for this purpose, the Japanese industries involved have in fact no

alternative but to establish them. Therefore the Arrangements entered into under the Export and Import Trading Law in compliance with the direction of MITI are not private agreements in effect and are no less than the implementation of the foreign trade policy of MITI, despite their form as agreements made among private parties.

3. With respect to the export of television sets to the United States, in 1962 MITI accurately recognized, in view of the importance of televisions as one of Japan's export products, the need for assuring their orderly exportation to avoid the possibility of trade conflicts.

Thus, MITI directed Japanese television manufacturers including the present Japanese defendants to enter into an agreement under Article 5-3 of the Export and Import Trading Law with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States, and further, directed the exporters to establish a new regulation to be observed by the members of the export association with respect to filing of export prices and other related matters, pursuant to the association's functions under Article 11, Sub-paragraph 2 of the same law regarding the same exports. MITI supervised the preparation of such agreements and regulation so that MITI's intention was correctly reflected. Such direction and supervision concerning minimum prices at which televisions could be sold for exportation to the United States and other matters were exercised continuously from 1963 until February 28, 1973 when such exporting arrangements were terminated.

4. Had the Japanese television manufacturers and exporters failed to comply with MITI's direction to establish such an agreement or regulation, MITI would have invoked its powers provided for in the Export Trade Control Order under the Foreign Exchange and Foreign Trade Control Law in order to unilaterally control television sales for export to the United States and carry out its established trade policy.

Therefore, when MITI decided the above-mentioned policy with respect to such sales and directed the television manufacturers and exporters to conclude, under the Export and Import Trade Law, such agreement and regulation relating to the minimum prices at which televisions could be sold for the United States market and other matters, the Japanese television manufacturers and exporters had no alternative but to establish the agreement and regulation in compliance with the said direction.

Certification by the Embassy of Japan, April 23, 1979

EMBASSY OF JAPAN
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008
(202) 234-2266

April 23, 1979

I Toshihiko Tanabe, Counselor, Embassy of Japan, hereby certify that the attached document is a true and correct copy of the official statement that was transmitted by the Embassy of Japan to the Department of State on April 25, 1975.

/s/ *T. Tanabe*
Toshihiko Tanabe
Counselor
Embassy of Japan
Washington, D.C.
April 23, 1979

Letter from the Embassy of Japan to the United States District Court for the Eastern District of Pennsylvania, July 11, 1980

EMBASSY OF JAPAN
WASHINGTON, D.C.

July 11, 1980

The Honorable
Edward R. Becker
United States District Court
for the Eastern District of
Pennsylvania
United States Courthouse
601 Market Street
Room 16614
Philadelphia, Pennsylvania 19106

Dear Sir:

I have the honor, on behalf of the Government of Japan, to inform you, Sir, of the views of the Government of Japan as *amicus curiae* in reference to the proceedings IN RE: Japanese Electronics Products Antitrust Litigation, M.D.L. 189.

This letter is to certify and reaffirm that the Ministry of International Trade and Industry ("MITI") has been, since at least 1960, and continues to be the government organ empowered and responsible for the detailed implementation of the basic trade policies of the Japanese Government.

As such, MITI was and is empowered and authorized to act for the Government of Japan in making the statement as attached to the Note Verbale dated April 25, 1975 which was delivered to the Department of State of the United States by the Embassy of Japan.

Accept, Sir, the assurances of my highest consideration.

Sincerely yours,
/s/ *Yoshio Okawara*
Yoshio Okawara
Ambassador Extraordinary
Plenipotentiary of Japan

Letter From Donald I. Baker, Assistant Attorney General, Antitrust Division, to Senator Edward M. Kennedy, February 16, 1977

Department of Justice
Washington, D.C. 20530

16 FEB 1977

Honorable Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of January 17, 1977 which inquires about the enforcement policy of the Antitrust Division in regard to international cartels affecting the U.S., and requests specific information concerning our position in regard to joint export of color television sets to the U.S. by Japanese manufacturers. We welcome the interest of your committee in this important subject. It seems particularly appropriate now since this is a period in which international economic questions, especially ones involving competition and cartels, have come to have great importance and urgency.

In response to these developments, the Antitrust Division has itself become increasingly active in the international field. Since 1973, we have increased the size of our Foreign Commerce Section from eight attorneys to twenty. We have filed over a dozen international antitrust cases in the last three years. These prosecutions have involved the Arab boycott, potash, the DeBeers diamond cartel, market allocation between British and American publishers, lithium, mink, persulfates and, most recently, unauthorized international airline fare increases. The Justice Department has recently become a member of an interagency task force on international commodity agreements, so the Antitrust Division will be able to co-

tribute its expertise in that developing area. The Antitrust Division, as mandated by Congress in the 1974 Trade Act, now consults regularly with the ITC in regard to the competitive issues which arise in the enforcement of amended Section 337 of the Tariff Act. Also, we issued on January 26, 1977 an Antitrust Guide for International Operations to assist U.S. businessmen in understanding the antitrust rules governing their conduct in foreign commerce.

In all these efforts, we view our primary mission to be ensuring that the American consumer receives the full benefits of free and open competition from both U.S. and foreign suppliers. Our second goal is to try to ensure that all firms competing in American export or import trade are not subjected to illegal competitive tactics which injure the competitive process itself. We attempt to achieve these goals by means consistent with well-established U.S. policies favoring the freest possible international trade and the avoidance of any discrimination between firms based on nationality. In all matters of significance in this area, we are in continual consultation with the U.S. Department of State, which not only provides assistance in the conduct of international investigations but also keeps us informed of foreign policy obstacles which can hamper the investigation, prosecution or relief aspects of an international antitrust case.

With the background of these general observations, let me turn to the specific inquiries contained in your letter. Your letter quotes a 1970 document which indicates that there has been an export agreement for Japanese television sets. You then raise six questions in regard to the policy of the Antitrust Division in this matter. This letter will deal with the questions in the order in which you raise them.

The first inquiry you make is why the Antitrust Division opposed ITC action in this area while also declining to investigate the matter ourselves. As we stated in our letter to the ITC, we opposed action by them on a number of grounds, the first of which was that the issues raised had already been considered in a Treasury dumping proceeding or were cognizable in a countervailing duty proceeding. Therefore, we concluded that an ITC 337 proceeding would be largely duplicative of antidumping and countervailing duty proceedings, a result which Congress opposed and which might amount to anticompetitive harassment of Japanese firms. Our second difficulty with the complaint made to the ITC was that it charged the Japanese firms with "conspiring" jointly to solicit export subsidies from their Government. We pointed out that U.S. Supreme Court rulings in the *Hoerr* and *Pennington* cases hold that such joint solicitation is protected activity not subject to the antitrust laws. We argued that it would neither be fair nor legal to try the Japanese firms for joint solicitation of a type which their American rivals would be allowed to undertake. We noted also, during oral argument, that there is no evidence of export agreements after 1973, while Section 337 is clearly aimed at remedying current problems rather than redressing old grievances. We also pointed out the puzzling inconsistency between the complainants' charge that the Japanese have injured American firms with low prices and the fact that the export agreement shown at the hearing sets a *minimum* price which is required to be at least as high as the Japanese domestic price. We believe that it would be an unwise and excessively protectionist policy for the ITC to permit Section 337 to be employed so as to give firms which lose dumping or countervailing duty cases a "second shot" at keeping out foreign competition or heaping legal costs on foreign sellers. Similarly, we questioned whether Section 337 should be interpreted to allow major investigations or protectionist remedies in situations where the complainant is unable to advance even a prima facie case which fulfils the substantive standards of the anti-dumping, countervailing duty or antitrust laws.

The second part of your first question concerns the policy reasons which led us not to initiate our own investigation of this matter. There are quite a number of reasons, which we believe should be considered in combination with each other: First, no American TV firm has ever asked us to undertake an investigation and supplied us with evidence indicating a possible viola-

tion of the Sherman Act. On the contrary, they have chosen to seek relief by means of antidumping and Section 337 complaints. Second, two of the American television manufacturers have brought their own antitrust action against the Japanese, which action has been in process for at least five years. The Antitrust Division, given its limited resources, has often made the decision not to duplicate a private antitrust action in a complex and controversial area, particularly when it appears that the parties are all represented by competent counsel and are exploring the facts and the law quite thoroughly. Third, it is clear from a Japanese diplomatic note dated April 25, 1975 that the export agreement among Japanese firms was fully authorized by the Japanese Ministry of Trade and Industry, and it is claimed in that letter that the Japanese Ministry *directed* the firms to enter into and comply with such an arrangement. If the conduct were directed by the Japanese Government in a legitimate exercise of its power to control exports leaving Japan, our courts would be highly likely to uphold the arrangement against antitrust challenge on the grounds of a "foreign compulsion" or "act of state" principle. Fourth, it appears that certain aspects of the "check-price" or minimum price agreement were suggested or imposed by the Japanese Government in order to avoid or respond to antidumping charges in the U.S. There seems to be some possible anomaly in charging the Japanese with dumping if they price cut in the U.S. and with Sherman Act violations if they do not. Fifth, it also appears that a major portion of Japanese penetration of the American market has been accounted for by Sony and Panasonic, which apparently were not members of the export association in its later years, which were not named as defendants in the § 337 proceeding, and which sell their sets at higher prices than those charged for competing American sets.

Your second question concerns whether our position at the ITC and our decision not to investigate were reached on a unilateral basis. The answer to that question is unequivocally yes. We learned after we had prepared our advice letter to the

ITC that the State Department, the Treasury, the Office of the Special Trade Representative, and the Federal Trade Commission were all going to send letters opposing the investigation on grounds somewhat similar to those we advanced; but we did not know this before our position was formulated and it had no influence on our position. Our decision not to conduct an antitrust investigation of the matter has been made entirely unilaterally, and there has been no consultation with anyone else about it.

Your third question concerns whether spokesmen for Japanese television exporters or for the Japanese Embassy have approached us or tried to influence us concerning our position at the ITC or in regard to an investigation. The answer is no. Japanese diplomats have on occasion asked us to explain the relationship between Treasury, ITC and private antitrust actions, but have made no attempt to influence our positions. Staff members of the Antitrust Division have occasionally inquired of counsel for both sides in the TV-set private antitrust case about the issues in the case and its progress. This has been at our initiative, and reflects our usual policy of trying to keep abreast of major private antitrust cases.

Your fourth question concerns whether the Japanese export agreement would violate the Sherman Act if engaged in by Americans. The answer appears to be no. Congress has provided in the Webb-Pomerene Act that registered export associations of American firms are fully exempted from operation of the Sherman Act. Such export associations are allowed to fix prices, allocate quotas and allocate customers. Our courts have held that American exporters lose their exemption if they combine or conspire with foreign rivals (*United States* v. *Alkali Export Assn.*, 86 F.Supp. 59 (S.D.N.Y. 1949)). It appears that the Japanese export association is entirely national and has never been accused of conspiring with its foreign rivals.

Your fifth and sixth questions concern whether our reluctance to investigate the Japanese TV set export association reflects a general policy in regard to foreign export agreements and whether such policy has had specific application in

the past. Of course, the basic approach of the Antitrust Division is to judge any transaction on its individual merits in light of all relevant facts and policy considerations. Nevertheless, the most accurate general answer to your question is that we have generally followed for some years a policy against suing members of a foreign export association for conduct which the U.S. would permit under the Webb-Pomerene Act. We have on a number of occasions investigated whether foreign exporters have engaged in conduct, such as international market allocation or customer allocation within the U.S., which would be beyond our Webb-Pomerene exemption and might also be in excess of what they were specifically authorized to do or could be legitimately authorized to do by their governments. Besides the obvious policy and equity factors favoring this approach, we have also been influenced by questions of practicality and efficient resource allocation. It has seemed likely to us that if a foreign government is committed to the idea of controlled exports, it could probably achieve such control through direct state involvement, a liberal merger or joint venture policy, or some form of mandatory system. In light of this, it seems quite probable that if we were to sue a foreign export association, arguing that governmental authorization was an insufficient defense, the ultimate result of such a suit might well be continuation of the same conduct in even a more rigid form, as well as foreign policy controversy.

We hope that this discussion makes clear our thinking in regard to this complex and difficult issue. We welcome further discussion of either this particular matter or of the general policy question. Let me again emphasize that our approach to both this case and the broader issue remains one of great interest and constant reexamination.

Sincerely yours,
/s/ *Donald I. Baker*
Donald I. Baker
Assistant Attorney General
Antitrust Division

Statement by John H. Shenefield, Assistant Attorney General, Antitrust Division, Before the United States Senate Committee on the Judiciary, April 12, 1978

STATEMENT BY

JOHN H. SHENEFIELD
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE

THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

DEPARTMENT OF JUSTICE AUTHORIZATION
(SUPPLEMENTARY TESTIMONY)

ON

APRIL 12, 1978

Shortly after I assumed my duties, about a year ago, representatives of Zenith and National Union Electric (NUE) Corporations came to me and complained that several Japanese color television receiver manufacturers were engaged in a concerted program to fix prices and predatorily destroy the American TV industry. I was aware that my predecessor, Don Baker, in a letter to Senator Kennedy, had communicated his decision not to conduct any investigation of these charges at that time.

The complainants assured me that if the Antitrust Division reviewed the pretrial discovery in the private antitrust litigation they had begun in the Eastern District of Pennsylvania 8 years before, we would conclude that a full investigation and probably prosecution of these Japanese enterprises was warranted.

Given the seriousness of the charges and the assurance that the evidence to back them up was accessible, I agreed to take a fresh look—to have the Antitrust Division undertake a preliminary investigation to determine if there was any reasonable basis for proceeding with a full investigation through compulsory process.

We quickly learned that there was in the pending litigation a sweeping pretrial protective order, which prohibits any person not designated by the parties as "qualified" to have *any* access to *any* information discovered from *any* party without that party's express permission.

The defendants, potential targets of a Justice Department investigation, were understandably reluctant to give their permission to what they saw as simply further harassment, given the six separate government investigations of their export practices that had taken place in the previous seven years. Nevertheless, after four months of difficult negotiations, we were able to pierce the protective order, with the permission of the parties, and get access to the evidentiary material relating to the allegations. One of the conditions to our obtaining this access is that Antitrust Division officials are under the same limitations of non-disclosure as other persons subject to the protective order. Therefore, I may not, by order of the court, disclose to you or anyone else, either in open or executive session, the specific facts accumulated in that pretrial record.

For the past 6 months, we have inspected approximately 35,000 pages of documents, fully 5,000 untranslated from the original Japanese. More than half of these were shown to us by Zenith and NUE. We are assured that we have seen the best evidence the complainants have so far gathered. About 10,000 of these documents were made available for inspection by third parties in the litigation; and we reviewed approximately 4,000 documents shown to us by Japanese defendants. We have committed substantial resources to this matter. The professional time along has exceeded 200 full person work days. This investigation has been conducted with the cooperation of both

plaintiffs and defendants in the Pennsylvania litigation and without any pressure from or intervention by any other agency of the United States Government or any official or representative of the Japanese Government.

I recently concluded a detailed review of the evidence examined. I have agreed with the investigative staff's unanimous conclusion that it does not provide any reasonable basis for conducting a full-scale Antitrust Division investigation of predatory activity by the Japanese color TV industry. In short, we found no evidence of on-going concerted activity by Japanese enterprises aimed at the United States market.

As you are, I am aware of the check price agreements of an earlier period. However, we have no evidence that these agreements continued beyond 1973. In addition, we found no evidence that, even in earlier periods, any concerted activity was intended to or did serve a predatory purpose. In any event, at the present time an orderly marketing agreement is in place, the effect of which will be to reduce the percentage of Japanese color TV sales in the United States in 1978 to approximately 16% of the U.S. market.

Most importantly, in view of the charges made by Zenith and NUE, we found no evidence of concerted predatory conduct intended to destroy and supplant the U.S. color TV industry, either at an earlier period or at the present time. Given this finding after careful investigation, I find no basis for proceeding further.

I understand that pre-trial discovery in the Pennsylvania litigation is not complete. It may be that at a trial, the plaintiffs will persuade a fact finder that there has been a violation of the antitrust laws but at this point, based on all the available evidence, we have no basis to justify commencement of a full scale investigation.

Let me assure you that we will continue, as we have in the past, to watch closely the American television industry and the practices in our markets of Japanese and other export cartels. For example, we currently are reviewing a proposed joint

venture to manufacture color televisions by General Electric and Hit[a]chi. In addition, we have other related matters under consideration that I cannot discuss at this time. The Antitrust Division is always watchful for foreign cartel activity that impacts on United States markets. While our Webb-Pomerene Act exemption from antitrust laws is occasionally embarrassing to us when we talk tough about foreign cartels, we will not tolerate or ignore evidence of anticompetitive activities by foreign export cartels in United States markets. Where we find such a cartel, even if organized and supervised with the approval of a foreign government, imposing anticompetitive restraints in United States markets, we will investigate and, if warranted, prosecute.

Next month, I will be visiting in Tokyo with Japanese officials, at their invitation, to discuss antitrust competition issues. I have already requested that the practices of Japanese export cartels as they may affect United States markets, and how they may impinge upon U.S. antitrust laws, be placed on the agenda.

Letter From Attorney General William French Smith to Ambassador Yosiho Okawara of Japan, May 7, 1981

Department of Justice
Washington, D.C. 20530

May 7, 1981

His Excellency
Yoshio Okawara
Ambassador of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Ambassador:

This letter is in response to the request of the Government of Japan, set forth in its letter of May 7, and the two enclosures thereto, for the views of the Department of Justice on antitrust questions regarding measures now being considered by the Government of Japan to unilaterally restrain the export of passenger cars to the U.S. so as to cooperate with the U.S. Government's domestic automobile industry recovery program.

The Government of Japan has advised us that the Ministry of International Trade and Industry (MITI), which it represents has legal authority and responsibility in the Government of Japan for carrying out basic trade policy, including authority to take the measures described in your letter and its two enclosures, and has authority to maintain orderly exports, will establish at its discretion the maximum number of passenger cars which may be exported to the U.S. by individual Japanese companies. MITI will issue a written directive to each company stating the maximum number of cars that company may export to the U.S. in a specified period.

Further, MITI will direct individual companies to submit accurate monthly reports on passenger car exports to the U.S. so as to assure the implementation of the export limitation directive. It is understood, and the directive will state that, in any case in which it becomes clear that any company threatens

to exceed the limits set forth by MITI, the Government of Japan will promptly make the export of cars to the U.S. subject to export licensing, in accordance with Article Forty-eight (48) of the Foreign Exchange and Foreign Trade Control Law, (Law No. 228 of 1949), and Article One (1) of the Export Trade Control Order (Cabinet Order No. 378 of 1949 as amended), by amending the Export Trade Control Order. MITI will then enforce the export maximums it established for each company by refusing to license exports in excess of those maximums. The Government of Japan has advised us that MITI has the authority to impose this requirement, that it would be a violation of Japanese law to export cars without an export license in that situation, and that such violation would be punished pursuant to Japanese law by fines, penalties or other sanctions.

In these circumstances, we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department of Justice is of the view that implementation of such an export restraint by the Government of Japan, including the division among the companies by MITI of the maximum exportable number of units, and compliance with the program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that American courts interpreting the antitrust laws in such a situation would likely so hold.

Further, in response to your inquiry regarding exports of passenger cars to Puerto Rico and the exports of automobiles which are classified under "commercial vehicles" in JAMA statistics but classified under "passenger cars" in the U.S., we would like to state that if export limitations are achieved through the same measures and authorities previously described, the sovereign compulsion defense to any antitrust action that might be brought under United States laws would be equally available.

Sincerely,

/s/ *William French Smith*

William French Smith

Attorney General

Section 1 Of The Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 (1970):

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 Of The Sherman Act, 26 Stat. 209, 15 U.S.C. § 2 (1970):

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction therof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 73 Of The Wilson Tariff Act, 28 Stat. 570, 15 U.S.C. § 8 (1970):

§ 8. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less that $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Section 801 of the Revenue (Antidumping) Act of 1916, 39 Stat. 798, 15 U.S.C. § 72 (1970):

§ 72. Importation or sale of articles at less than market value or wholesale price.

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a) (1970):

§ 13. Discrimination in price, services, or facilities.

(a) Price; selection of customers.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained

shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 7 Of The Clayton Act, 38 Stat. 731, 15 U.S.C. § 18 (1970):

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof,

or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or make illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Federal Rules Of Evidence, 28 U.S.C.:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.